

IN THE  
**SUPREME COURT OF THE UNITED STATES**

October Term, 1978

No. **78-1534**

**MICHAEL R. McMAHON** . . . . . Petitioner

**VERSUS**

**KENTUCKY BAR ASSOCIATION** . . . Respondent

**PETITION FOR A WRIT OF CERTIORARI TO  
THE SUPREME COURT OF KENTUCKY  
AND  
APPENDIX**

**BURTON MILWARD, JR.**

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April 9, 1979

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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. \_\_\_\_\_

MICHAEL R. McMAHON - - - *Petitioner*

*v.*

KENTUCKY BAR ASSOCIATION - - - *Respondent*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

The Petitioner, MICHAEL R. McMAHON, respectfully prays that a Writ of Certiorari issue to review the Opinion and Order of the Supreme Court of Kentucky, rendered in this proceeding on November 21, 1978.

## OPINIONS BELOW

The Opinion of the Supreme Court of Kentucky rendered on November 21, 1978 (Appendix A) is reported at *Kentucky Bar Association v. McMahon*, Ky., 575 S. W. 2d 453 (1978). A Petition for Rehearing was filed and was denied on January 16, 1979 (Appendix B).

Upon motion of the Petitioner, the Supreme Court of Kentucky entered an Order Granting Stay of Ex-

ecution and Enforcement of the Mandate on January 31, 1979 (Appendix C), staying enforcement of the Mandate until May 1, 1979. [NOTE: Petitioner files with this Petition a motion requesting the United States Supreme Court further to enter an Order staying enforcement of the Kentucky mandate pending final disposition of this Certiorari proceeding.]

### **JURISDICTION**

The Opinion of the Supreme Court of Kentucky (Appendix A) was entered on November 21, 1978; and a timely Petition for Rehearing was denied by Mandate and Order of the Supreme Court of Kentucky (Appendix B) on January 16, 1979, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

### **QUESTIONS PRESENTED**

1. Whether, consistent with principles of due process, Petitioner should not have been punished by suspension from the practice of law where the neglect for which he has been punished occurred as a result of his suffering from the medical disease of alcoholism rather than from any form of moral transgression, where he voluntarily made restitution to the client, where he has stabilized his alcoholic condition and demonstrated fitness to continue in the practice of law, and where the punishment imposed serves no purpose.

2. Whether the Petitioner's suspension from the practice of law amounted to cruel and unusual punish-

ment where the suspension was based on neglect caused by the medical disease of alcoholism rather than from any form of moral transgression.

3. Whether the Petitioner's suspension from the practice of law amounted to cruel and unusual punishment where supervised probation, not suspension, is the appropriate remedy for a recovered alcoholic who has, since the time of the neglect involved, demonstrated his fitness to continue in the practice of the law.

### **CONSTITUTIONAL PROVISIONS INVOLVED**

The Fifth Amendment to the United States Constitution provides in part:

No person shall . . . be deprived of life, liberty, or property, without due process of law.

. . .

The Eighth Amendment to the United States Constitution provides as follows:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

### **STATEMENT OF THE CASE**

The Kentucky Bar Association charged Petitioner with three counts of professional misconduct which it considered brought the bench and bar into disrepute. Petitioner was charged with: (1) falsely advising a client as to the status of litigation; (2) loaning a contingency fee client \$200 on three occasions; and (3)

paying the client money from an "escrow account." (Appendix D). These three charges arose from Petitioner's handling of a single case for a single client.

Petitioner responded to the charges admitting the allegations except for the allegation that he had falsely advised the client. (Appendix E).

The Bar Association's fact-finding body, the Trial Committee, heard evidence on both sides and found that none of the charges had much merit.

Charge Number One concerning the veracity of statements by the respondent to Mary C. Phillips, is not proven.

Charge Number Three regarding the payment of monies from an escrow account, is of no merit.

Charge Number Two concerning loans to a contingency fee client, is specious.

[Report of Trial Committee: Appendix F, pp. A-12-A-13.]

The Trial Committee recommended that charges one and three be "taken for naught" and that charge two warranted a "private reprimand."

It is the recommendation of this Trial Committee that Charge Numbers One and Three be taken for naught; and that Charge Number Two be subjected to a "private" reprimand for the sole reason that the rule is in existence. [Report of Trial Committee: Appendix F, p. A-13.]

The Trial Committee reached its conclusions and made its recommendations based on the following facts:

1.

Mary C. Phillips had previously been in a series of automobile accidents; and had suffered back

pain as early as 1969, for which she wore a back brace for an extended period of time. She continued to have pain in the cervical area, through 1973. Mrs. Phillips' most recent automobile accidents before the one in question were on December 13, 1973, and December 15, 1973.

2.

Respondent, Michael R. McMahon, entered into a contingent fee contract dated August 24, 1974, for the representation of Mary C. Phillips in her claim for personal injuries growing out of an automobile accident on January 29, 1974 (the official accident report relative to the automobile accident bears the date of January 31, 1974).

3.

On August 7, 1974, Mary C. Phillips was admitted at St. Anthony's Hospital, Louisville, Kentucky for a surgical operation.

4.

Mary C. Phillips, in addition to her physical complaints, was undergoing extreme emotional hardship, due to poor financial circumstances and the responsibility of supporting infant children in a broken home.

5.

The respondent herein failed to file a tort action to recover damages for Mary C. Phillips within the one-year time prescribed by law.

6.

The respondent advised Mary C. Phillips of his failure to file the action, and further advised her that his interests were adverse to her, and that she should consult other counsel.

7.

Respondent paid Mary C. Phillips the sum of \$4,322.50, in addition to approximately \$600.00 in loans.

8.

No release was taken from Mary C. Phillips by the respondent upon payment of the sums of money.

9.

The \$200.00 loans, on each of three occasions, were made for the purpose of alleviating Mrs. Phillips' financial hardships, not the least of which was caused by her inability to have funds to pay for a "sewer tap" to her home.

10.

The \$4,322.50 paid by the respondent to Mary C. Phillips (not including some \$600.00 in loans to her) constituted the reasonable value of her case. Mrs. Phillips' tort claim was "questionable" both because of her previous injury and the apparent light nature of her accident.

11.

The respondent suffers from alcoholism. The respondent's alcoholic condition is presently stabilized. Alcoholism is an affliction for which there is no known cure. However, stabilization can be effectuated by various processes which will enable the patient to adequately negotiate life.

[Report of Trial Committee: Appendix F, pp. A-11-A-12.]

The Trial Committee heard evidence from five witnesses.

Mrs. Mary Phillips testified that she retained Petitioner to represent her in a personal injury case, on

a contingency basis, and that Petitioner did not file suit on her behalf within the statutory time. [Transcript, hereinafter referred to as T., pp. 8-9, 27, 43.] She testified that Petitioner loaned her \$200 on three occasions to help her meet various personal obligations. [T., pp. 13-15.] She further testified that, on October 23, 1976, Petitioner came to her home and presented her with a check on his escrow account for \$4,321.50. [T., pp. 15-16, 27-28.] This was the approximate probable recovery amount on her personal injury suit which Petitioner had neglected to file.

Mr. Peter Manning, an attorney, testified that he had shared office space with Petitioner during the time that Petitioner had "represented" Mrs. Phillips. [T., p. 49.] Manning testified that, during that time, Petitioner suffered from the disease of alcoholism.

Mike had a severe drinking problem. . . . He would come in the office sporadically. He would miss appointments. He would miss court dates. He was sick; he was an alcoholic. [T., p. 50.]

Manning testified that, in his opinion, Petitioner neglected to file Mrs. Phillips' suit and prepare the case "excellently" solely because of alcoholism.

I think if he weren't drinking, he would have prepared the case excellently and done what he is able to do when he is not drinking. [T., p. 53.]

Q. 168. Do you think . . . that his neglect is solely because of being an alcoholic?

A. Yes, sir. [T., p. 54.]

Manning further testified that since the time Petitioner neglected Mrs. Phillips' personal injury action, Petitioner had joined Alcoholics Anonymous and arrested his alcoholism.

When we moved into the new office, Mike's practice was kept in well order. His cases are prepared, to the best of my knowledge. I know he joined AA . . . . [T., p. 51.]

Manning testified that at the time of the hearing, Petitioner had overcome the disease of alcoholism and is the "excellent lawyer" he is capable of being.

He is an excellent lawyer. I would put Mr. McMahon against any lawyer I know or come in contact with. He is one of the smartest people I know. He can prepare a case as well as anybody that I know, and he is a fine lawyer. [T., p. 52.]

Mr. Forrest L. Yocum, an Alcoholics Anonymous counselor, testified the Petitioner has been active in AA for several years and has stopped drinking.

I'm not sure just how long Mike has been without alcohol, but I know it's better than a year. He has been a fine person to me. He is active in AA. And being active, I mean he is there for more than himself. He is trying to help other people, too. This is what we call an active AA. He is working with other people, taking an active part in the group. [T., p. 62.]

Yocum testified that a person afflicted with alcoholism often neglects business transactions.

Q. 209. And you admit that a person addicted to alcohol often is not competent to handle business transactions, do you not?

A. While under the influence of alcohol, practicing alcoholic, I would say that would be correct. [T., p. 66.]

Yocum testified that, in his opinion, Petitioner would remain sober and would not be crippled by alcoholism in the future.

Q. 207. In your association with Michael in the various AA meetings, and of your personal knowledge, would you expect Mike, now that he has been on the wagon for a year or so, to stay sober?

A. I do. I expect Mike to stay sober. He is an active member of AA. I don't figure any problems out of him. [T., p. 65.]

Dr. S. Stanton Baker, a physician with extensive experience treating alcoholics, testified that he had consulted with Petitioner regarding Petitioner's alcoholism. [Baker Deposition, p. 3.] He testified that he was familiar with Petitioner's neglect in handling Mrs. Phillips' personal injury case, and that such neglect would not be unusual for a person suffering from alcoholism.

Q. 13. Did he give you any details in terms of that he is charged with neglecting a client's business in failing to file a lawsuit within the prescribed time?

A. Yes, sir, he did.

Q. 14. Would this be an unusual situation for

a person who is a drinking alcoholic, to neglect business in this manner?

A. No, sir, I don't think it would be unusual at all. [Baker Deposition, p. 6.]

Dr. Baker further testified that alcoholism is different from drunkenness, that alcoholism is a recognized illness like diabetes or cancer or pneumonia.

And I would like to emphasize that contrary to what is commonly felt about alcoholism, this is an entirely different matter from drinking, or drunkards, or anything of that sort. It is an illness, and it was declared an illness in 1955 by the American Psychiatric Association and in '56 by the American Medical Association. And it has all of the qualities and requirements for a disease entity that any other disease has. It is no different as a disease than diabetes or cancer or pneumonia or whatever, other illness that the human body might be afflicted with. [Baker Deposition, pp. 16-17.]

Mr. Harry Hargadon, Jr., a well-known attorney specializing in personal injury cases, testified that Mrs. Phillips' personal injury suit which Petitioner failed to file had a probable range of "four to six thousand dollars."

The case has a value, a range value . . . from my standpoint, that of the plaintiff's trial attorney, of four to six thousand dollars. [Hargadon Deposition, p. 8.]

Based on the evidence presented to it, the Trial Committee of the Kentucky Bar Association recommended

that two counts "be taken for naught" and recommended only "a private reprimand" on the third count. [Report of Trial Committee: Appendix F, p. A-13.]

The Board of Governors of the Kentucky Bar Association, however, reviewed the record of the same evidence and found the Petitioner guilty of all three counts, and entered the following Conclusions of Law, Opinion and Order:

1. Respondent did falsely advise his client as to the status of her litigation and this was not denied by testimony.

2. Respondent loaned Mary C. Phillips \$200.00 on each of three occasions to be paid back out of the contingency fee.

3. Respondent paid Mary C. Phillips money from an escrow account not belonging to Mrs. Phillips and did not advise her that her case had been settled.

4. This conduct was such conduct that could be and was calculated to bring the bench and bar into disrepute.

[Board of Governors' Opinion: Appendix G, p. A-18.]

The Board of Governors frankly stated that Petitioner's alcoholism "brought about his neglect to perform his duty to his client," and that Petitioner had "taken steps to alleviate this problem."

5. Respondent did have a drinking problem at the time of this transaction and was considered as a mitigating factor in that it brought about his neglect to perform his duty to his client and the

fact that he has taken steps to alleviate this problem is a step in the right direction and if such conduct continues should be considered if and when Respondent files for reinstatement. [Board of Governors' Opinion: Appendix G, p. A-18.]

Nevertheless, the Board of Governors recommended that Petitioner "be suspended from the practice of law" for a period of one year.

6. The Board concludes that the Respondent has been found guilty as charged and recommends that Respondent, Michael R. McMahon, be suspended from the practice of law in the State of Kentucky for a period of one year. [Board of Governors' Opinion: Appendix G, p. A-18.]

Even though the Board of Governors found that Petitioner's neglect had been caused by alcoholism and that Petitioner had now overcome this alcoholism, the Board of Governors did not recommend probation of the one-year suspension.

The Supreme Court of Kentucky approved the one-year suspension recommended by the Board of Governors.

The recommendation of the Kentucky State Bar Association is approved and McMahon is suspended from the practice of law in this state for a period of one year. [Opinion: Appendix A, p. A-4.]

Petitioner's Petition for Rehearing was denied and the Mandate issued. [Appendix B, p. A-5.]

This Petition for a Writ of Certiorari is Petitioner's only appeal.

## REASONS FOR GRANTING THE WRIT

**First Question: Due Process Prevents Punishment for Neglect Resulting From Medical Disease Rather Than From Moral Transgression, Where the Punishment Serves No Purpose.**

1. The actual, practical effect of the decision of the Supreme Court of Kentucky is that it means that attorneys practicing in Kentucky may be suspended or disbarred from their very livelihood for neglect resulting from medical disease, wholly irrespective of considerations of moral transgression.

2. In this country, alcoholism is recognized as a disease.

[A]lcoholism is an illness requiring treatment and rehabilitation. . . . [Title 42 U.S.C. §4541, Alcohol Abuse and Alcoholism, Congressional Findings and Declaration of Purpose.]

"Alcoholism" means a medically diagnosable disease characterized by chronic, habitual or periodic consumption of alcoholic beverages resulting in the (a) substantial interference with an individual's social or economic functions in the community, or (b) the loss of powers of self-control with respect to the use of such beverages. [Kentucky Revised Statutes, §222.011, Alcohol and Drug Education, Treatment, and Rehabilitation, Definitions.]

3. There can be no doubt that the disease of alcoholism has the raw power to cause an individual to neglect interpersonal relations and social and economic

functioning, such as the performance of an attorney's duties.

The National Council on Alcoholism has defined "alcoholic" as "a person who is powerless to stop drinking and whose drinking seriously alters his normal living pattern." The American Medical Association has defined alcoholics as "those excessive drinkers whose dependence on alcohol has attained such a degree that it shows a noticeable disturbance or interference with their bodily or mental health, their interpersonal relations, and their satisfactory social and economic functioning." *Powell v. Texas*, 392 U. S. 514, 560 n. 3 (1968).

4. In the present case, the record unequivocally demonstrates that the neglect here involved was caused by Petitioner's suffering from the disease of alcoholism.

McMahon's drinking problem . . . brought about McMahon's neglect to perform his duty to his client. [Opinion: Appendix A, p. A-3.]

Respondent did have a drinking problem at the time of this transaction and . . . it brought about his neglect to perform his duty to his client. . . . [Board of Governors' Opinion: Appendix G, p. A-18.]

The Respondent suffers from alcoholism. The respondent's alcoholic condition is presently stabilized. [Report of Trial Committee: Appendix F, p. A-12.]

5. The decision of the Supreme Court of Kentucky found that alcoholism "brought about McMahon's neglect," but then *punished* Petitioner for having suffered

from the illness and its natural consequences. The decision of the Supreme Court of Kentucky deprived Petitioner of his very livelihood and right to practice law based on its own holding that Petitioner had suffered from a disease which caused neglect!

6. Disbarment is a punishment or penalty imposed upon a lawyer in proceedings of a quasi-criminal nature.

Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. . . . These are adversary proceedings of a quasi-criminal nature. *In the Matter of John Ruffalo, Jr.*, 390 U. S. 544, 550-551 (1968).

An attorney should not be prevented from practicing law except for valid reasons.

[A] person cannot be prevented from practicing except for valid reasons. *Schwartz v. Board of Bar Examiners*, 353 U. S. 232, 239, n. 5 (1957).

In the present case, it is respectfully submitted that the disputed decision, in depriving Petitioner of his livelihood and suspending him from the practice of law for neglect caused by a recognized disease, has not imposed a punishment for a *valid reason* as required by due process.

7. Petitioner's neglect was caused by illness and not by moral transgression or conscious wrongdoing. As such, it violates principles of due process to *punish* Petitioner for negligent conduct which was a product of illness.

[A]lcoholism is caused and maintained by something other than the moral fault of the alcoholic, something that, to a greater or lesser extent depending upon the physiological or psychological makeup and history of the individual, cannot be controlled by him. *Powell v. Texas*, 392 U. S. 514, 561 (1968), dissenting opinion.

In the present case, Petitioner's neglect originated in illness. Petitioner had no control over his neglect, and he should not be punished therefor.

8. The record demonstrates, as set forth in the Statement of Facts of this Petition, that *as Petitioner began to recover from the illness of alcoholism, he immediately acted to correct his neglect. He admitted his neglect to the client. He restored the client to wholeness by paying to her the reasonable value of her case. He stabilized his alcoholic condition and has arrested his alcoholism so that it no longer bears on his practice of law.* [Report of Trial Committee, Findings of Fact: Appendix F, p. A-12.]

9. The consequences of allowing the disputed decision to govern other similar situations are devastating. The record in this proceeding repeatedly demonstrates that Petitioner's neglect was caused by illness from which Petitioner has now recovered. The record shows that, as the illness subsided, Petitioner took every available step to correct his neglect. Even under such circumstances, the disputed decision now looms as a towering threat that illness will be punished and subsequent steps to correct neglect have no value. The disputed decision is fundamentally unfair because it has no purpose in its *punishment*.

10. This Court is in a proper position to reassure attorneys and other professionals that due process protections yet guard against punishment for illness and punishment which serves no purpose.

**Second Question: It Is Cruel and Unusual to Suspend Petitioner From the Practice of Law for Neglect Where the Neglect Was Caused by Disease.**

1. The actual, practical effect of the decision of the Supreme Court of Kentucky is to permit punishment for having suffered a recognized illness, including the effects of that illness, so that such punishment amounts to cruel and unusual punishment.

2. Alcoholism is a recognized illness. Title 42 U.S.C. §4541, Alcohol Abuse and Alcoholism, Congressional Findings and Declaration of Purpose, quoted *supra*; Kentucky Revised Statutes §222.011(2)(3), Definitions, quoted *supra*.

3. The Opinion candidly observes that alcoholism "brought about McMahon's neglect to perform his duty to his client." [Opinion: Appendix A, p. A-3.]

4. The Justices of this Court, principally in minority opinions, have shown a willingness to boldly speak out what we all feel: that it is against our evolving values of morality to punish people for being sick.

Justices Fortas, Douglas, Brennan and Stewart boldly spoke our feelings when they reminded:

We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for

being sick. This age of enlightenment cannot tolerate such barbarous action. *Powell v. Texas*, 392 U. S. 514, 566, n. 28 (1968), dissenting opinion.

Mr. Justice Fortas boldly spoke our feelings when he stated:

[P]unishment of alcoholics does society no good. It can be applauded only by the uninformed or the sadistic. It is neither a deterrent nor a cure for those afflicted. On the contrary, as testified here, it is not only ineffective, but "particularly anti-therapeutic because it increases the feelings of worthlessness that all alcoholics have . . . ." *Budd v. California*, 385 U. S. 909 (1966), Certiorari denied, dissenting opinion.

In the present case, the punishment imposed by the disputed decision does society no good. Petitioner has already stabilized the alcoholism that gave birth to his neglect. He has voluntarily restored the neglected client to wholeness.

To suspend the Petitioner from the practice of law, under these facts, is a barbarous action. It is decidedly antitherapeutic. It benefits no one.

5. In *Furman v. Georgia*, this Court stated that the cruel and unusual language of the Constitution "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Furman v. Georgia*, 408 U. S. 238, 329 (1972). In the present case, a quasi-criminal proceeding, *In the Matter of John Ruffalo, Jr.*, 390 U. S. 544, 551 (1968), the disputed decision has ignored "evolving standards of decency" and has punished Petitioner for his illness

and the natural consequences thereof, in violation of the constitutional protection against cruel and unusual punishment.

6. The consequences of allowing the disputed decision to govern other similar situations are devastating. The disputed decision threatens punishment for illness. The disputed decision mercilessly ignores an ill person's steps, upon recovery, to correct the consequences of his neglect. It is respectfully submitted that such a decision militates against "evolving standards of decency" and should be reversed.

**Third Question: It Is Cruel and Unusual to Suspend Petitioner From the Practice of Law Where Supervised Probation, Not Suspension, Is the Appropriate Remedy for a Recovered Alcoholic Who Has, Since the Time of the Neglect Charged, Arrested the Cause of Neglect and Demonstrated His Fitness to Continue in the Practice of Law.**

1. The actual, practical effect of the decision of the Supreme Court of Kentucky is to impose the cruel and unusual punishment of suspension upon Petitioner even after Petitioner has overcome the alcoholism that caused the neglect for which punishment was imposed. The punishment is cruel and unusual because it takes away a man's livelihood without regard for the unique circumstances surrounding neglect born of alcoholism, and subsequent recovery.

2. The punishment is cruel and unusual because it is out of step with "evolving standards of decency." The following cases, involving lawyer discipline and the

unique circumstances surrounding professional neglect born of alcoholism, and subsequent recovery, reflect "evolving standards of decency." These cases demonstrate that strict probation for the lawyer is the usual and reasoned approach in such cases, not the wresting away of an ill or recovered lawyer's entire livelihood.

The Supreme Court of Oregon found that strict probation, not actual suspension, would "serve both as an incentive to the accused to continue his efforts at rehabilitation and as an adequate measure to protect the public." *In re Lewelling*, Ore., 417 P. 2d 1019, 1020 (1966). In *Lewelling*, the court found, as in our case, that the accused had ceased to use intoxicating liquor and had pledged not to use it in the future. The court ordered a two-year suspension, to be withheld upon compliance with the conditions of a five-year probation.

The Board recommends that accused be subjected to the sanction of a two-year suspension from the practice of law, the sanction to be imposed only if the accused fails, during a period of five years, to fulfill the following conditions: (1) That he refrain entirely from the use of alcoholic beverages and (2) that he discontinue the delay and neglect which characterized his professional conduct in the past and which brought upon him the charges in this proceeding. *Id.*, 417 P. 2d at 1020.

In the present case, Petitioner should likewise be strictly probated both as an incentive to recovery from illness and as an adequate measure to protect the public.

The Supreme Court of California found that strict probation, not actual suspension, would be the appro-

priate sanction. In *Tenner v. State Bar*, Calif., 576 P. 2d 92 (1978), the court observed that "alcoholism and the pressure of financial and emotional problems adversely affected [the attorney] during the period of misconduct," but that the attorney could "redeem himself" if permitted to continue practicing under a probationary suspension. The court ordered a three-year period of probation and approved strict conditions that the attorney:

- (1) effect restitution, (2) obtain psychiatric help, (3) abstain from intoxicants, (4) enroll in the program of the State Bar Committee on Alcohol Abuse, and (5) submit quarterly written reports of compliance with the terms of probation, State Bar Act, and Rules of Professional Conduct. *Id.*, 576 P. 2d at 92.

In the present case, Petitioner should likewise be strictly probated both to allow him to "redeem himself" and as adequate protection for the public.

The Supreme Court of Florida found that strict probation, not actual suspension, would be the appropriate sanction. In *Florida Bar v. Budzinski*, Fla., 322 So. 2d 511 (1975), the court probated the attorney for three years, ordered restitution, and detailed the following conditions of probation.

A. The Respondent will not commit any crimes or violate the Integration Rule or Code of Professional Responsibility.

B. The Respondent will not consume any alcoholic beverage unless prescribed by a physician.

C. The Respondent will file quarterly reports directly with the Clerk of the Florida Supreme Court with a copy to Staff Counsel for The Florida Bar. In preparing such reports, Respondent shall include the following minimum information: 1) A report from his personal physician indicating his progress in treating his alcoholism. 2) A case-load report listing every matter which has been pending in the Respondent's office during the preceding quarter. The name of every client and brief description of the subject matter shall be included along with a statement about whether the case is not current, current, or disposed of. If the case is pending before a court, the court and case number shall be included in the report.

D. During the period of probation, the Respondent consents, with one working day's notice, to an inspection of his case files and trust account records by a member of The Florida Bar designated by the Staff Counsel for The Florida Bar. The confidentiality of those files shall be maintained.

E. BREACH OF PROBATION AND REVIEW BY THE FLORIDA SUPREME COURT. The Respondent agrees that his breach of the conditions of his probation may be determined by the filing with the Supreme Court of a grievance committee report approved by the Board of Governors, finding probable cause of the breach. The Board of Governors may make a recommendation of discipline when such a report is filed.

*Id.*, 322 So. 2d at 514.

In the present case, Petitioner should likewise be strictly probated instead of having his livelihood taken

from him. This Petitioner has already voluntarily made restitution; he has arrested the illness that overcame him and caused his neglect. The punishment of suspension is cruel and it is unusual. Cf., *Florida Bar v. Taylor*, Fla., 167 So. 2d 729 (1964), in which the Supreme Court of Florida ordered supervised probation for the attorney.

The conditions of the probation shall be that the respondent conduct himself in an ethical and professional manner and refrain from excessive use of intoxicants during the probationary period. *Id.*, 167 So. 2d at 730.

In the present case, Petitioner should likewise be strictly probated.

The Supreme Court of Minnesota, in *In re Nordstrom*, Minn., 264 N. W. 2d 629 (1978), explicitly recognized that the recovered alcoholic's "prospects of succeeding have greater promise if he is highly motivated and closely supervised." *Id.*, 264 N. W. 2d at 631. *This is exactly the point of this Petition:* that it violates constitutional guarantees of due process and protections against cruel and unusual punishment to punish for neglect caused by the *illness* of alcoholism. Where the attorney has recovered from the illness, "evolving standards of decency" require probation, not suspension, as an appropriate sanction. In *Nordstrom*, the Supreme Court of Minnesota deferred final disposition of the case for a year, set conditions to be met, and offered to continue probation if the conditions had been met.

Accordingly, we defer final disposition of the matter for one year. If during that period respondent has totally abstained from the use of alcohol, has applied himself diligently to his practice, has begun restitution in a methodical manner as directed by the Lawyers Professional Responsibility Board, and has, in all other respects, complied with the terms of his stipulation and with such other directives as the board may prescribe, the court will permit respondent to continue the practice of law for an appropriate probationary period. However, any violations of the terms of his probation brought to the court's attention in the future will be grounds for immediate suspension or disbarment. *Id.*, 264 N. W. 2d at 631.

In the present case, strict conditions should also be outlined and close supervision imposed, but suspension which terminates Petitioner's livelihood is out of place. Suspension is cruel; it is unusual.

The case of *In re Walker*, S. Dak. 254 N. W. 2d 452 (1977), is a case in point. In *Walker*, the Supreme Court of South Dakota observed that the

misconduct found against respondent was proximately caused by his alcoholism and occurred primarily prior to the beginning of his total abstinence. . . . *Id.*, 254 N. W. 2d at 457.

In the present case, the misconduct found against Petitioner also was proximately caused by his alcoholism and also occurred primarily prior to the beginning of his total abstinence.

The Supreme Court of South Dakota, on facts identical to the present proceeding, held it proper that the

attorney "be given an opportunity to continue the practice of law conditional upon his continued abstinence from alcohol. . . ." *Id.*, 254 N. W. 2d at 457. The court ordered a two-year suspension, to be imposed only if the attorney failed to fulfill two conditions:

- (1) That for a period of five years from the date hereof he continued to refrain entirely from the use of alcoholic beverages; and
- (2) That for a like period he not commit any act that would constitute a violation of the code of professional responsibility that would constitute grounds for the imposition of discipline pursuant to SDCL 16-19.

*Id.*, 254 N. W. 2d at 457.

The court noted that it had extended probation to the attorney not because he was an admitted alcoholic, but rather because he was a "bona fide recovered" alcoholic now fit "to continue in the practice of law."

The respondent did not receive the consideration that we have given him because he is an admitted alcoholic but rather because he is, in our view, a bona fide recovered or arrested alcoholic who has for the past two and one-half years demonstrated his fitness to continue in the practice of law. *Id.*, 254 N. W. 2d at 457.

The present Petitioner likewise is a bona fide recovered or arrested alcoholic who has for the past two and one-half years demonstrated his fitness to continue in the practice of law. Precisely under these circumstances, it is respectfully submitted that 1) the suspension

which now cuts Petitioner entirely away from the practice of law is cruel and unusual and 2) strict probation with close supervision is the appropriate remedy in the present case.

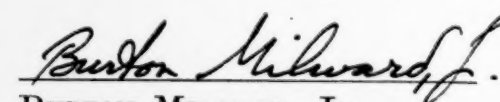
3. The usual sanction for an attorney's neglect caused by alcoholism, where the attorney has subsequently recovered from and arrested the illness and demonstrated his fitness to continue in the practice of the law, is strict probation and close supervision. The disputed decision imposes cruel and unusual suspension. The disputed decision is wrong; it should be reversed, and probation ordered.

4. The consequences of allowing the disputed decision to govern other similar situations is that the very livelihood of other attorneys can be taken away from them—without hope for probation—even where they have 1) recovered from the illness of alcoholism, 2) voluntarily made full restitution for neglect caused by illness, and 3) demonstrated fitness to continue in the practice of law! Such a decision is at odds with “evolving standards of decency” that define the protection against cruel and unusual punishment. The excessive and unfair order of suspension should be reversed.

### CONCLUSION

For these reasons, it is respectfully submitted that a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Kentucky.

Respectfully submitted,



BURTON MILWARD, JR.

319 Kentucky Home Life Building  
Louisville, Kentucky 40202

*Counsel for Petitioner*

# APPENDIX

A-1

## APPENDIX A

RENDERED: NOVEMBER 21, 1978

### SUPREME COURT OF KENTUCKY

File No. 78-SC-455-KB

KENTUCKY BAR ASSOCIATION - - - Complainant

v

MICHAEL R. McMAHON - - - Respondent

#### PER CURIAM

This is a disciplinary proceeding in which the Kentucky Bar Association charged McMahon with three counts of unprofessional conduct calculated to bring the bench and bar into disrepute. McMahon was charged with: (1) falsely advising a client as to the status of litigation; (2) loaning a contingency fee client \$200.00 on three occasions; and (3) paying the client money from an "attorney at law escrow account."

Counsel for McMahon filed a response admitting the allegations contained in the charges except any allegations as to the falsity of representations made by him to his client.<sup>1</sup>

A trial committee appointed by the Board of Governors of the association heard evidence on both sides and found: "Charge number one concerning the veracity of statements by [McMahon] to [his client] is not proven; charge number three regarding payment of monies from an escrow

<sup>1</sup>Counsel for McMahon before the trial committee is not the same attorney who represents him on review.

account is of no merit; charge number two concerning loans to a contingency fee client is specious." The trial committee recommended that charges one and three "be taken for naught and that charge number two be subjected to a "private" reprimand for the sole reason that the rule is in existence."<sup>2</sup>

McMahon did not fare as well with the Board of Governors. The members discussed each charge separately and the evidence offered in support of and against the charges and found: (1) that McMahon entered into a contingency fee contract with the client in March 1974, "however the contract was not signed until August 24, 1974." The Board also found that McMahon loaned his client \$200.00 on each of three occasions and that the client testified she "considered it a loan" to be paid back when the case was settled. The Board found also that in the latter part of 1974 and the early part of 1975, the client contacted McMahon concerning her case on several occasions and McMahon's stock answer was "that he was working on the case." In 1976, the client through a Mr. Huff learned that McMahon had failed to file a suit in her behalf. On October 23, 1976, McMahon presented the client a check in the amount of \$4,321.50 drawn on his attorney at law escrow account. There was no evidence that a settlement had been made. McMahon told the client he had a conflict of interest and "that she should get her a lawyer."

The Board of Governors found McMahon guilty of professional misconduct and recommended that he be suspended from the practice of law in the state of Kentucky for a period of one year.

McMahon, in his notice for review and brief, makes a feeble attempt to convince this court that the evidence fails to sustain the findings of the Board of Governors. He admits quite frankly, that if he is unable to prevail in that

<sup>2</sup>McMahon did not testify.

endeavor then the punishment recommended by the Board of Governors is too severe because a drinking problem was the cause of the neglect to properly handle his client's business.

This court has read the evidence and is of the view that it was more than sufficient to sustain the Board's finding. The Board considered McMahon's drinking problem. It considered also that problem a mitigating factor, in that it brought about McMahon's neglect to perform his duty to his client. In its conclusions the Board commended McMahon for the action he has taken to alleviate the drinking problem as "a step in the right direction and if such conduct continues should be considered if and when respondent [McMahon] files for reinstatement."

The practice of law is an honorable profession. "Its first demand is a meet and lively responsibility without which it could not survive as a profession. If a respondent does not possess it he belongs in some other line of work."<sup>3</sup>

In the past two years this court has reviewed a number of disciplinary proceedings in which lawyers failed to protect the interest of their respective clients. Without exception, each was suspended from the practice of law for a term commensurate with his degree of neglect.<sup>4</sup>

<sup>3</sup>Kentucky Bar Association v. Booth, Ky., 444 S. W. 2d 123 (1969).

<sup>4</sup>Kentucky Bar Association v. Vincent, Ky., 538 S. W. 2d 39 (1976);  
Kentucky Bar Association v. Dillman, Ky., 539 S. W. 2d 294 (1976);  
Kentucky Bar Association v. Murphy, Ky., 549 S. W. 2d 295 (1976);  
Kentucky Bar Association v. Clem, Ky., 554 S. W. 2d 360 (1977);  
Kentucky Bar Association v. Dillman, Ky., 554 S. W. 2d 362 (1977);  
Kentucky Bar Association v. Martin, Ky., 558 S. W. 2d 173 (1977);

(Footnote continued on following page)

The recommendation of the Kentucky State Bar Association is approved and McMahon is suspended from the practice of law in this state for a period of one year. The Kentucky State Bar Association shall recover its costs as provided by SCR 3.450.

All concur.

Attorneys for Complainant:

LESLIE G. WHITMER, Director  
MICHAEL HOOPER, Assistant Director  
Kentucky Bar Association  
403 Wapping Street  
Frankfort, Kentucky 40601

Attorneys for Respondent:

MICHAEL R. McMAHON  
835 West Jefferson, #202  
Louisville, Kentucky 40202  
HENRY A. TRIPLETT  
3rd Floor, 231 South Fifth Street  
Louisville, Kentucky 40202

(Footnote continued from preceding page)

Kentucky Bar Association v. Littleton, Ky., 560 S. W. 2d 5 (1977);  
Kentucky Bar Association v. Dillman (disbarment), Ky., 562 S. W. 2d 318 (1978);  
Kentucky Bar Association v. Littleton, Ky., 561 S. W. 2d 88 (1978).

APPENDIX B

SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION

v.

MICHAEL R. McMAHON

File No. 78-SC-455-KB

*In Supreme Court*  
*Opinion Rendered November 21, 1978*

MANDATE

It is therefore ordered that the Respondent, Michael R. McMahon, be and he is hereby suspended from the practice of law in this Commonwealth for a period of one year.

It is therefore considered that the Respondent is further ordered to comply with RAP 3.390, a copy of which is attached and considered included as a part of this mandate.

It is further ordered that Respondent be required to pay the costs in this proceedings.

January 16, 1979 Respondent's Petition for  
Rehearing Denied.

A Copy—Attest:

(s) Martha Layne Collins,

Issued January 16, 1979

Clerk

## APPENDIX C

## SUPREME COURT OF KENTUCKY

78-SC-455-KB

KENTUCKY BAR ASSOCIATION - - - Complainant

v.

MICHAEL R. McMAHON - - - Respondent

ORDER GRANTING STAY OF EXECUTION AND  
ENFORCEMENT OF THE MANDATE

On motion of the respondent Michael R. McMahon, pro se, a stay of execution and enforcement of this Court's mandate of January 16, 1979, is granted effective January 31, 1979, for the period to and including May 1, 1979, in order that respondent may make application to the Supreme Court of the United States for a writ of certiorari.

Any additional request for stay deemed necessary should be addressed to the Supreme Court of the United States. Entire Court sitting. All concur.

ENTERED January 31, 1979.

(s) John S. Palmore  
Chief Justice

## APPENDIX D

## SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION - - - Complainant

v.

MICHAEL R. McMAHON - - - Respondent

## CHARGE

Comes now the Kentucky Bar Association, by and through its Inquiry Tribunal, and states that Respondent Michael R. McMahon, whose last known address is 228 South Seventh Street, Louisville, Kentucky, a member of said association, did engage in the following unprofessional and unethical conduct:

## I

In or about March, 1974, Mary C. Phillips, whose last known address is 7602 Buena Vista Court, Louisville, Kentucky, employed Respondent to bring suit and seek recovery of damages arising from a traffic accident. Mrs. Phillips was falsely told by Respondent on many occasions that he was attending to her legal representation and had filed suit. On or about October 23, 1976, Respondent admitted to Mrs. Phillips that he had neglected to file suit and that the statute of limitations had expired.

## II

Within the same facts and circumstances contained in Count I above, Mrs. Phillips was having great financial difficulties which included debts for medical x-rays and to her local sewer district. In or about December, 1975, Re-

spondent loaned \$600 to Mrs. Phillips informing her that it was to be repaid out of the proceeds of any settlement they may recover.

### III

Within the same facts and circumstances contained in Count I above, Respondent, on or about October 23, 1976, told Mrs. Phillips of his failure to file suit and tendered to her a check drawn upon his "Attorney at Law, Escrow Account" at the Liberty National Bank and Trust Company of Louisville, Kentucky, account no. 00084069 payable to Mrs. Phillips in the amount of \$4,321.50. Respondent told Mrs. Phillips she could use said sum for the debt owed to the sewer district. Respondent did not inform Mrs. Phillips as to whose funds from his escrow account she was being given.

WHEREFORE, Complainant charges that such actions by Respondent constitute unethical and unprofessional conduct calculated to bring the bench and bar of Kentucky into disrepute; and that discipline of an appropriate degree should be administered to Respondent in accordance with RAP 3.380.

Kentucky Bar Association  
By: (s) William P. Donan  
Chairman, Inquiry Tribunal

Attest:

(s) Leslie G. Whitmer  
Director, Kentucky Bar  
Association

## APPENDIX E

### SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION - - - Complainant

v.

MICHAEL R. McMAHON - - - Respondent

### RESPONSE

For response herein, the respondent states as follows:

1. He admits the allegations contained in paragraphs 1, 2, and 3 except any allegations as to the falsity of representations made by the respondent to Mary C. Phillips.

Robert E. Delahanty  
Counsel for Respondent  
Suite 401, 701 West Walnut Street  
Louisville, Kentucky, 40203

It is hereby certified that a copy hereof was on April 5, 1977, mailed to Mr. Leslie Whitmer, Director, Kentucky Bar Association, 315 West Main Street, Frankfort, Kentucky, 40601.

Robert E. Delahanty

**APPENDIX F****SUPREME COURT OF KENTUCKY**

KENTUCKY BAR ASSOCIATION - - - Complainant

v.

MICHAEL R. McMAHON - - - Respondent

**REPORT OF TRIAL COMMITTEE**

Pursuant to RCA 3.360, your Trial Committee files the following report.

**STATEMENT OF CHARGES**

The respondent is charged with: (1) falsely advising a client as to the status of litigation; (2) loaning a contingency fee client certain monies; and (3) paying a client money from an "attorney at law escrow account".

**STATEMENT OF DEFENSES OFFERED  
BY RESPONDENT**

The respondent admitted the allegations contained in the charges, but specifically denied the falsity of any representations.

**STATEMENT OF TRIAL PROCEEDINGS**

A hearing was held before the Trial Committee, at the Jefferson County Courthouse, Louisville, Kentucky, on July 29, 1977. The Kentucky Bar Association was represented by the honorable Carroll M. Redford, Sr. The respondent was represented by the honorable Robert E. Delahanty, attorney at law.

Evidence was heard from the complaining witness, Mrs. Mary C. Phillips, on behalf of the Bar Association. The respondent offered as evidence at the hearing the testimony of Peter F. Manning, of Louisville, Kentucky, a member of the Kentucky Bar; and of Mr. Forrest Lindsay Yocum, of Louisville, Kentucky.

The respondent supplemented his proof with the depositions of Dr. S. Stanton Baker and attorney Harry Hargadon, Jr., taken on August 16, 1977.

**FINDINGS OF FACT**

1.

Mary C. Phillips had previously been in a series of automobile accidents; and had suffered pain as early as 1969, for which she wore a back brace for an extended period of time. She continued to have pain in the cervical area, through 1973. Mrs. Phillips' most recent automobile accidents before the one in question were on December 13, 1973, and December 15, 1973.

2.

Respondent, Michael R. McMahon, entered into a contingent fee contract dated August 24, 1974, for the representation of Mary C. Phillips in her claim for personal injuries growing out of an automobile accident on January 29, 1974 (the official accident report relative to the automobile accident bears the date of January 31, 1974).

3.

On August 7, 1974, Mary C. Phillips was admitted at St. Anthony's Hospital, Louisville, Kentucky, for a surgical operation.

4.

Mary C. Phillips, in addition to her physical complaints, was undergoing extreme emotional hardship, due to poor financial circumstances and the responsibility of supporting infant children in a broken home.

5.

The respondent herein failed to file a tort action to recover damages for Mary C. Phillips within the one-year time prescribed by law.

6.

The respondent advised Mary C. Phillips of his failure to file the action, and further advised her that his interests were adverse to her, and that she should consult other counsel.

7.

Respondent paid Mary C. Phillips the sum of \$4,322.50, in addition to approximately \$600.00 in loans.

8.

No release was taken from Mary C. Phillips by the respondent upon payment of the sums of money.

9.

The \$200.00 loans, on each of three occasions, were made for the purpose of alleviating Mrs. Phillips' financial hardships, not the least of which was caused by her inability to have funds to pay for a "sewer tap" to her home.

10.

The \$4,322.50 paid by the respondent to Mary C. Phillips (not including some \$600.00 in loans to her) constituted the reasonable value of her case. Mrs. Phillip's tort claim was "questionable" both because of her previous injury and the apparent light nature of her accident.

11.

The respondent suffers from alcoholism. The respondent's alcoholic condition is presently stabilized. Alcoholism is an affliction for which there is no known cure. However, stabilization can be effectuated by various processes which will enable the patient to adequately negotiate life.

#### STATEMENT OF CONCLUSIONS

Charge Number One concerning the veracity of statements by the respondent to Mary C. Phillips, is not proven.

Charge Number Three regarding the payment of monies from an escrow account, is of no merit.

Charge Number Two concerning loans to a contingency fee client, is specious.

#### STATEMENT OF RECOMMENDATIONS

It is the recommendation of this Trial Committee that Charge Numbers One and Three be taken for naught; and that Charge Number Two be subjected to a "private" reprimand for the sole reason that the rule is in existence.

Dated January , 1978.

(s) John D. Miller, Chairman  
(s) Harry W. Berry  
(s) Darrell Hancock

## APPENDIX G

## SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION - - - Complainant  
 v.  
 MICHAEL R. McMAHON - - - Respondent

**FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINION AND ORDER OF THE BOARD OF GOVERNORS, KENTUCKY BAR ASSOCIATION**

This matter was heard by the duly constituted Board of Governors at their regular meeting July 21, 1978, at Ken Lake State Park.

The Respondent, Michael R. McMahon, was charged by the Inquiry Tribunal of the Kentucky Bar Association under provisions of RAP 3.160 et sequi, on March 17, 1977, alleging conduct, which is calculated to bring the bench and bar into disrepute. The Respondent was charged with: (1) falsely advising a client as the status of litigation; (2) loaning a contingency fee client certain monies; and (3) paying a client money from an "attorney at law escrow account." These charges were duly served upon the Respondent by certified mail by the Director on March 17, 1977. A response to the charges was filed by Honorable Robert E. Delahanty, counsel for Respondent, admitting the allegations contained in the three paragraphs of the charge, except any allegations as to the falsity of representations made by the Respondent to Mary C. Phillips. On April 28, 1977, Honorable John M. Milliken, Chairman of the House of Delegates of the Kentucky Bar Association appointed Honorable Carroll

M. Redford, Sr., as attorney for Complainant and appointed Messrs. John D. Miller, Harry W. Berry, and Darrell B. Hancock as Trial Committee to conduct the hearing.

On July 29, 1977, the Trial Committee met in the Fiscal Court Room, Jefferson County Courthouse, Louisville, Kentucky, with Honorable Carroll M. Redford, Sr., being present and representing the Complainant along with Honorable John T. Damron and the Respondent was present and represented by Honorable Robert E. Delahanty. The evidence of the complaining witness, Mary C. Phillips, was heard for the Complainant. The Respondent did not testify, but the testimony of Attorney Peter F. Manning was taken and also that of Mr. Forrest Lindsay Yocum, member of Alcoholics Anonymous. Also, the Respondent offered the depositions of Dr. S. Stanton Baker and Attorney Harry Hargadon, Jr.

The report of the Trial Committee was duly accepted and the Board heard the report concerning the charges. Each charge was discussed at length and the facts were presented to sustain each charge in reference to charge (1) falsely advising a client as to the status of litigation it was noted in the record on page 12, question 55, when Mrs. Phillips was asked: "If she checked with Mr. McMahon often," she said, "Very often"; then question 56, "What report would be made to you?" she answered, "he was still working on it." On page 42, after Mrs. Phillips had been asked, "If a Mr. Huff had called and checked at the courthouse to see if the suit had been filed?" her response to question 135, "Then following that telephone call to the courthouse, did you call Mr. McMahon and discuss it with him?" "Yes sir." Her answer to question 136, "What did he tell you?" "That he had filed one." Based upon these responses, which were not denied, the Respondent had in fact falsely advised his client as to the status of litigation.

In reference to charge (2) loaning a contingency fee client certain monies, it was apparent that Mrs. Phillips

was telling the truth and really had no reason to lie about the money, since it was admitted that he let her have money on four different occasions. There were three checks for \$200.00 each and one check for \$4,321.50. When asked about the three checks that were for \$200.00, as we find on page 18, question 85, Mrs. Phillips stated in answer to the question, "Now, did you ever receive any additional funds, money from Mr. McMahon?" Her answer was, "To me, it was like a personal loan. I said, What about paying you back? He said, well, we will settle that when the settlement comes along." It was obvious that the Respondent had loaned money to Mrs. Phillips. There was also no doubt that the Respondent had paid his client money from his attorney at law escrow account, because the check for \$4,321.50, was noted of record and made a part of the evidence and not denied.

The witness, Attorney Peter F. Manning, testified that he had known Mr. McMahon since October, 1973, and had shared an office in Louisville with him. He also stated that Mr. McMahon was a good attorney, but did have a drinking problem at the time he was hired by Mrs. Phillips. However he did not know anything about the Phillips' case.

The witness, Forrest Lindsay Yocum, stated that he was a General Electric Company worker and was a member of Alcoholics Anonymous and had met Respondent at some of their meetings and felt that he could be helped. However, ever, he did not know anything about the Phillips' case.

The deposition of Dr. S. Stanton Baker was presented on behalf of the Respondent and Dr. Baker testified that he was an expert in the field of alcoholism and that he saw Mr. McMahon for about a 30 minute period. He felt that alcoholism was a disease and could be helped and that the Respondent could be helped. He did not know anything about the Respondent during the period of 1974.

The deposition of Attorney Harry Hargadon, Jr., was presented on behalf of the Respondent and testified that he

was an expert in the field of personal injury cases and that based on the facts presented to him, including the medical testimony, the value of Mary C. Phillips case as to damages was in the range of \$4,000.00 to \$6,000.00.

#### THE BOARD OF GOVERNORS MAKES THE FOLLOWING FINDINGS OF FACT:

1. The complaining witness, Mary C. Phillips, was in several accidents in Louisville, Kentucky, however, the one accident that we are concerned with is the one that occurred on January 29, 1974, and that she went to see Respondent, Michael R. McMahon, and entered into a contingency fee contract in March, 1974, however, the contract was not signed until August 24, 1974.

2. During the latter part of 1974 Mary C. Phillips was having personal difficulties and financial problems and the Respondent loaned her \$200.00 on each of three occasions and the complaining witness, Mary C. Phillips, stated that she considered it a loan. The Respondent said it could be paid back when the case was settled.

3. During the latter part of 1974 and early part of 1975 Mary C. Phillips contacted Mr. McMahon on several occasions and he stated that he was working on the case. It was during this period that the Respondent made the three \$200.00 loans.

4. It was in 1976 when Mrs. Phillips, through a Mr. Huff, had contacted the courthouse and found that no suit had been filed she then asked Mr. McMahon if he filed a suit and he said that he had.

5. On October 23, 1976, Respondent presented to Mary C. Phillips a check for \$4,321.50, bearing the notation that it came from Michael R. McMahon, Attorney at Law, Escrow Account, 228 S. 7th Street, Louisville, Kentucky 40202, and no evidence was shown that a settlement had been made, but Respondent did state that Mary C. Phillips and

he had a conflict of interest and that she should get her a lawyer.

6. The Respondent was suffering from alcoholism, but had apparently taken steps to alleviate his problem.

THE BOARD OF GOVERNORS MAKES THE FOLLOWING CONCLUSIONS OF LAW, OPINION AND ORDER:

1. Respondent did falsely advise his client as to the status of her litigation and this was not denied by testimony.

2. Respondent loaned Mary C. Phillips \$200.00 on each of three occasions to be paid back out of the contingency fee.

3. Respondent paid Mary C. Phillips money from an escrow account not belonging to Mrs. Phillips and did not advise her that her case had been settled.

4. This conduct was such conduct that could be and was calculated to bring the bench and bar into disrepute.

5. Respondent did have a drinking problem at the time of this transaction and was considered as a mitigating factor in that it brought about his neglect to perform his duty to his client and the fact that he has taken steps to alleviate this problem is a step in the right direction and if such conduct continues should be considered if and when Respondent files for reinstatement.

6. The Board concludes that the Respondent has been found guilty as charged and recommends that Respondent, Michael R. McMahon, be suspended from the practice of law in the State of Kentucky for a period of one year.

Kentucky Bar Association  
Board of Governors

(s) B. M. Westberry, President  
(s) Leslie W. Whitmer, Director  
Kentucky Bar Association